

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

NO. CR. S-05-46 LKK

Plaintiff,

v.

O R D E R

KIM J. ANDERSON,

Defendant.

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On September 24, 2004, the Forest Service issued defendant, Kim J. Anderson ("Anderson"), three violation notices: (1) for alleged violation of 36 C.F.R. Pt. 261.10(a), constructing and improvement on national forest land without special use authorization; (2) for alleged violation of 36 C.F.R. Pt. 261.9(a), damaging a natural feature; and (3) for alleged violation of 36 C.F.R. Pt. 261.9(g), digging in, excavating, disturbing in any way damaging any historic or archeological resource site.

On November 17, 2004, defendant appeared before Magistrate Judge Gregory G. Hollows and pled not guilty. A court trial was

1 scheduled for Monday January 24, 2005. The government did not seek  
2 any sentence of imprisonment and the court determined that no  
3 sentence of imprisonment would be imposed.<sup>1</sup>

4 After a 40-minute court trial where defendant represented  
5 himself, Judge Hollows found the defendant guilty of all three  
6 charges. Thereafter, the court imposed a sentence of court  
7 probation for one year, \$1700 in restitution, a \$500 fine, and a  
8 \$30 special assessment (\$10 per count). The court scheduled a  
9 hearing for February 16, 2005, giving the defendant the opportunity  
10 to show that he is unable to pay the fine and restitution.

11 At the February 16 hearing, Judge Hollows determined that  
12 defendant had the ability to pay the fine and restitution and  
13 ordered them paid by August 17, 2005. Judgment was entered on  
14 February 1, 2005. Defendant filed a timely notice of appeal. On  
15 May 10, 2005, the parties appeared before this court for a Status  
16 Conference regarding the appeal. The court granted the defendant's  
17 request for a stay of execution of the sentence pending the appeal  
18 and vacated the August 17 hearing.

19 Pending before the court is defendant's appeal of the  
20 magistrate judge's order imposing restitution.

21 **A. WHETHER THE MAGISTRATE JUDGE HAD STATUTORY AUTHORITY TO IMPOSE**  
22 **RESTITUTION**

23 Defendant argues that his sentence must be vacated because the  
24 magistrate judge improperly imposed restitution. He argues that

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25 <sup>1</sup> Thus, the court determined that defendant was not entitled  
26 to appointed counsel.

1 restitution as a criminal penalty is not authorized under 18 U.S.C.  
2 § 3556 for violations under Title 36 of the Code of Federal  
3 Regulations. Defendant's argument is unavailing.

4 While it is true that federal courts do not have the inherent  
5 power to award restitution, and may do so only pursuant to  
6 statutory authority, United States v. Hicks, 997 F.2d 594, 600 (9th  
7 Cir. 1993), the court is authorized by statute to impose certain  
8 conditions of probation under 18 U.S.C. § 3563(b).

9 The authority to impose restitution derives from 18 U.S.C.  
10 § 3556, which provides that a court may order restitution in  
11 accordance with §§ 3663A or 3663. Section 3663A of Title 18  
12 defines the criteria for mandatory restitution under the Mandatory  
13 Victims Restitution Act of 1996, which orders restitution for  
14 offenses that fall within titles 18 and 21 of the United States  
15 Code. Section 3663 defines the criteria for permissive  
16 restitution, which authorizes restitution of offenses described  
17 within Titles 18, 21, and 49 of the United States Code. These two  
18 sections provide that a federal court generally may order  
19 restitution as part of a sentence itself when the defendant is  
20 convicted of a specified collection of statutes under the specified  
21 Titles. This collection of statutes, however, does not include the  
22 statutes defendant violated here, which fall under offenses within  
23 Title 36.

24 The government, however, is correct that the court is  
25 authorized by statute to impose certain discretionary conditions  
26 of probation pursuant to 18 U.S.C. § 3563(b). Under § 3563(b), the

1 court may require the defendant to make restitution to a victim of  
2 the offense under § 3556 "but not subject to the limitation of  
3 section 3663(a) or 3663A(c)(1)(A))." The Ninth Circuit has  
4 interpreted that language to mean that when a court sentences a  
5 convicted defendant to a term of probation, it may include a  
6 condition that he pay restitution to a victim, regardless of  
7 whether the offense of conviction is listed in § 3663 or 3663A.  
8 See United States v. Gamma Tech Indus., Inc., 265 F.3d 917, 924 n.  
9 7 (9th Cir. 2001) ("Although Gamma Tech was not convicted of an  
10 offense specified in 18 U.S.C. § 3663(a)(1), which refers only to  
11 offenses in Titles 18, 21 and 49 of the U.S. Code, the district  
12 court properly imposed restitution as a discretionary condition of  
13 Gamma Tech's probation under 18 U.S.C. § 3563(b)(3)"<sup>2</sup>; see also  
14 United States v. Butler, 297 F.3d 505, 518-20 (6th Cir. 2002)  
15 (interpreting sections 3563(b) and 3583(b) as permitting  
16 restitution as a condition of supervised release in a Title 26 tax  
17 evasion case); United States v. Bok, 156 F.3d 157, 166 (2d Cir.  
18 1998) (same); United States v. Dahlstrom, 180 F.3d 677, 686 (5th  
19 Cir. 1999) (same in securities fraud case).

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22 <sup>2</sup> Defendant argues in his reply brief that the facts of the  
23 Gamma Tech case are distinguishable because it involved whether the  
24 district court had discretion to identify victims and impose  
25 restitution. This distinction, however, does not undermine the  
26 Ninth Circuit's clear explanation in footnote seven that "even  
though Gamma Tech was not convicted of an offense specified in 18  
U.S.C. § 3663(a)(1), which refers only to offenses in Titles 18,  
21 and 49 of the U.S. Code, the district court properly imposed  
restitution as a discretionary condition of Gamma Tech's probation  
under 18 U.S.C. § 3563(b)(3)."

1 In sum, binding precedent, as well as the statute's language  
2 support the conclusion that a judge may award restitution as a  
3 condition of supervised release without regard to the limitations  
4 in § 3663(a). Thus, Judge Hollows did not improperly impose  
5 restitution as a condition of probation because 18 U.S.C. § 3563  
6 provided adequate statutory authority.

7 **B. WHETHER THE RESTITUTION ORDER CORRESPONDED TO LOSS CAUSED BY**  
8 **DEFENDANT**

9 Defendant additionally argues that because the magistrate  
10 judge did not find that he actually dug the hole in question, the  
11 court could not impose restitution for the loss to the government  
12 in having to fill the hole, citing Hughey v. United States, 495  
13 U.S. 411, on remand, 907 F.2d 39 (5th Cir. 1990) (holding that the  
14 sentencing court may order restitution "only for the loss caused  
15 by the specific conduct that is the basis of the offense of  
16 conviction."). Defendant's argument is not supported by the  
17 record.

18 As the government maintains, Judge Hollows did find, based on  
19 the record, that defendant dug the hole. On cross-examination,  
20 Officer Harris, the U.S. Forest Service Law Enforcement Officer who  
21 issued defendant the three violation notices, testified that he did  
22 not see Mr. Anderson digging the hole. Trial Transcript ("T.T.")  
23 at 10:19-24; 11:23-24. However, when Mr. Anderson asked Officer  
24 Harris whether he knew who dug the hole, Officer Harris responded  
25 "Yes," and stated, "You. You told me that the week prior to that  
26 you had been there to dig the hole, and that this was a two-stage

1 construction project. You dug the hole the weekend before, or the  
2 weekend prior, or two weekends before, something like that, and  
3 that you had returned to complete the project." Id. at 12:18-22.  
4 The government rested its case thereafter. As the government  
5 notes, the plaintiff presented no evidence to rebut the  
6 government's evidence which included the defendant's admission to  
7 Officer Harris that he dug the hole. After the court found  
8 defendant guilty of all the charges set forth in the charging  
9 document, defendant asked the court whether the court had a witness  
10 saying that he had committed the aforementioned offenses, including  
11 the digging of the hole. Judge Hollows explained that, "I think  
12 we have admissions that I find as credible." Judge Hollows  
13 elaborated that such admissions were "recounted by the officer,"  
14 and constituted "sufficient evidence" to find defendant "guilty  
15 beyond a reasonable doubt" as to "all three charges." T.T. at  
16 22:7-13.<sup>3</sup>

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18 <sup>3</sup> It appears that defendant relies upon a statement that the  
19 magistrate judge made during the course of the sentencing, where  
the judge states:

20 In some respects, Mr. Anderson, if I had this, if I  
21 hadn't found that there's no possibility of  
imprisonment, I might well have put you in jail for a  
22 few days for - I don't know whether you dug the [hole],  
if you will, putting the cement in there on a natural  
23 [feature] and Forest Service land as if it were your own  
. . . .

24 T.T. at 24.

25 Despite the court's statement, however, it is clear that the  
26 court earlier concluded that there was sufficient evidence that the  
defendant admitted to Officer Harris that he had dug the hole.

1 Based on the record before it, this court is satisfied that  
2 the magistrate judge did find that defendant dug the hole and could  
3 impose restitution for the loss to the government in having to fill  
4 the hole.

5 **C. WHETHER THE MAGISTRATE JUDGE COMMITTED PLAIN ERROR IN NOT**  
6 **GIVING DEFENDANT MORE TIME TO CHALLENGE THE PROPOSED**  
7 **RESTITUTION AMOUNT**

8 Defendant further argues, for the first time on appeal, that  
9 he was not given sufficient notice that the government was seeking  
10 more than \$1700 in restitution. He claims that he should have had  
11 advance notice so that he could obtain an alternative estimate.  
12 Defendant maintains that he received no notice or opportunity to  
13 prepare or obtain an estimate from his own expert, and thus, his  
14 due process rights were violated. See Def.'s Opening Br. at 10-12.

15 Because defendant raises these issues for the first time on  
16 appeal, the court reviews for plain error. United States v. Olano,  
17 507 U.S. 725, 731 (1993). Under the plain error standard, the  
18 defendant must show that (1) there was error; (2) the error was  
19 "plain"; and (3) the error affected "substantial rights." Id. at  
20 732. If such a finding is made, this court is still not required  
21 to reverse unless the error "seriously affect[ed] the fairness,  
22 integrity, or public reputation of judicial proceedings." United  
23 States v. Cooper, 173 F.3d 1192, 1203 (1999) (quotation marks and  
24 citations omitted).

25 Defendant argues that under 18 U.S.C. § 3556, the court must  
26 follow various procedural requirements in ordering restitution, and  
that the court's failure to follow such requirements constitutes

1 plain error which requires vacating defendant's sentence and  
2 remanding the case for resentencing.<sup>4</sup> I cannot agree. As  
3 defendant correctly notes, the Ninth Circuit has held that in the  
4 absence of a plea agreement or in those cases where the plea  
5 agreement is silent on the amount of restitution, the court can  
6 order restitution in an amount up to the amount of "actual  
7 damages." United States v. Parrott, 992 F.2d 914, 917 (9th Cir.  
8 1992) (citing 18 U.S.C. § 3651). The "actual damages" must be  
9 established by some type of "judicial determination." Id. (citation  
10 omitted). The court noted that "[s]uch judicial determination may  
11 be made at trial" and that it might also "be made after a separate  
12 hearing for the purpose of fixing the amount of restitution." Id.  
13 (citations omitted). As defendant explains, "[b]efore the amount  
14 of restitution can be determined, however, the defendant must be  
15 afforded notice," citing United States v. Schiek, 806 F.2d 943, 944  
16 (9th Cir. 1986), cert. denied, 481 U.S. 1032 (1987).

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19 <sup>4</sup> Among other things, 18 U.S.C. § 3664 requires that:

20 (a) For orders of restitution under this title, the  
21 court shall order the probation officer to obtain and  
22 include in its presentence report, or in a separate  
23 report, as the court may direct, information sufficient  
24 for the court to exercise its discretion in fashioning  
25 a restitution order. The report shall include, to the  
26 extent practicable, a complete accounting of the losses  
to each victim, any restitution owed pursuant to a plea  
agreement, and information relating to the economic  
circumstances of each defendant. If the number or  
identity of victims cannot be reasonably ascertained, or  
other circumstances exist that make this requirement  
clearly impracticable, the probation officer shall so  
inform the court.



1 In the case at bar, there is no doubt that the no plea  
2 agreement existed and that the charging document did not specify  
3 the amount of loss which would be the appropriate basis for a  
4 restitution amount. The court made a determination as to the  
5 restitution amount after the government provided it with a report  
6 from an engineer who estimated the cost of removing the cement and  
7 refilling the hole at \$1790.67. T.T. at 22. Judge Hollows  
8 discussed the possibility of allowing defendant to restore the  
9 site, which "includes restoring that to its natural [state], it's  
10 filling in the hole . . . ." T.T. 23:12-14. The government  
11 rightly notes that defendant did not object to the restitution  
12 amount thereafter but only objected to his ability to pay. The  
13 government argues that the court's determination serves as  
14 sufficient notice to meet statutory requirement. This argument  
15 does not comport with Parrott where the Ninth Circuit held that  
16 "[b]efore the amount of restitution can be determined, however, the  
17 defendant must be afforded notice."

18 Unfortunately, the court does not further elaborate on what  
19 would constitute sufficient "notice." The parties have failed to  
20 provide the court with authority which elaborates on what type of  
21 notice a defendant must be afforded under the circumstances. The  
22 court is also unable to locate other binding authority which might  
23 provide guidance in the instant case. It appears to the court that  
24 defendant was not provided with prior notice of the restitution  
25 requested by the government, and that the first time he was  
26 informed of restitution was when he was briefly shown the

1 government's engineer report at trial. T.T. 23-24.

2 Despite the above conclusion, this court cannot conclude that  
3 the lack of notice affected defendant's "substantial rights."  
4 Defendant argues that his substantial rights were affected because  
5 if had he been afforded notice, he might have been able to obtain  
6 an estimate from his own expert. Repl. at 9. The record reflects  
7 that defendant probably could not have obtained his own expert to  
8 provide an estimate of damages, even if another hearing were set  
9 to determine restitution after defendant was provided a copy of the  
10 engineer's report at trial. At the close of the government's case,  
11 the court asked defendant whether he intended to present a case  
12 with evidence and witnesses. Defendant stated that "I was going  
13 to go up and get some pictures, but I waited too long, and it got  
14 all snowed in, so there was really nothing I could take a picture  
15 of." T.T. at 19.<sup>5</sup>

16 Moreover, and perhaps more to the point, defendant has offered  
17 nothing to this court to indicate the amount ordered was

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19 <sup>5</sup> Further, although defendant argues that the court had  
20 already made a determination as to restitution following trial, and  
21 that no further hearing was scheduled to determine the amount of  
22 restitution, the record is not completely clear as to that fact.  
23 It might be argued that the February 16 hearing was scheduled to  
24 determine whether restitution was appropriate. Judge Hollows  
25 explained to defendant at the end of trial that in February he was  
26 to bring his financial records. Specifically, Judge Hollows stated  
that after he received defendant's complete financial record, he  
would "make a final determination as to whether or not you can do  
that or not." Notably, he also stated that "[i]f you can't, I'll  
re-impose some other type of sentence at that point in time." T.T.  
at 28 (emphasis supplied). Thus, as the government argues, it is  
not completely clear whether the February hearing date was  
scheduled in order to determine whether defendant could pay the  
restitution.

1 inappropriate. Under the circumstances, any error committed did  
2 not seriously affect the fairness or integrity of the judicial  
3 proceedings. Indeed, the record demonstrates that the magistrate  
4 judge acted fairly and preserved the integrity of defendant's  
5 judicial proceedings. Judge Hollows heard defendant in mitigation,  
6 considered the possibility of allowing defendant to do the work to  
7 refill the hole himself (which the government objected to), and set  
8 a further hearing to determine whether defendant was able to pay  
9 the \$1700 restitution and fines.

10 **ORDER**

11 For all of the reasons set forth above, the court affirms the  
12 magistrate judge's order. Because the magistrate judge's sentence  
13 was stayed pending this appeal, the court orders that the stay be  
14 lifted, reinstates the sentence, whereby the defendant will be on  
15 court probation for one year, and he must pay \$1700 restitution,  
16 a \$500 fine, and a \$30 special assessment within six months of the  
17 reinstatement of his sentence.

18 IT IS SO ORDERED.

19 DATED: January 5, 2006.

20 /s/Lawrence K. Karlton  
21 LAWRENCE K. KARLTON  
22 SENIOR JUDGE  
23 UNITED STATES DISTRICT COURT  
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